IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 360 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHANJIBHAI HARIBHAI ROHIT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 360 of 2002

MR NN PRAJAPATI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR SS PATEL A.P.P. for Respondent

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 04/11/2003

ORAL JUDGEMENT

This is an appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 challenging the judgment

and conviction order dated 12.02.2002 recorded by the learned Additional Sessions Judge, (Fast Track Court), Vadodara in Session Case no.162 of 2000 convicting the present appellant for the offences punishable under Section 363, 366 and 376 of the Indian Penal Code, and inflicted the following punishment :-

(1) For the offence punishable under Section 363, R.I. for two years and fine of Rs.1,000=00, in default of payment of fine, R.I. for three months;
(2) For the offence punishable under Section 366, R.I. for three years and fine of Rs.2,000=00, in default of payment of fine, R.I. for four months;
(3) For the offence punishable under Section 376, R.I. for seven years and fine of Rs.3,000=00, in default of payment of fine, R.I. for five months; substantive sentence orders to be run concurrently.

2. In fact three accused persons were prosecuted in the aforesaid sessions case including the present appellant. It was alleged against the appellant and other accused persons that on 14.02.2000 they kidnapped one Minakshi - daughter of the informant aged about 16 years from the guardianship of her parents from village Simli in Karjan Taluka of Vadodara District and that they all kidnapped her with a view to see that she may be subjected to physical relation. It was also alleged that the present appellant committed rape on her. It seems that the appellant and the victim in the company of two other persons had run away on the aforesaid date. However, since she did not return, the father of the girl filed F.I.R. and investigation was undertaken. During the course of the investigation the appellant was arrested. At the end of the investigation, chargesheet was filed, the case was committed to the Court of Sessions. There the appellant was provided with copies of the papers of the investigation, charge was prepared and framed and the appellant pleaded not guilty to the said charge. Therefore, evidence was recorded. At the close of the evidence, further statement of the appellant under Section 313 of the said Code was recorded. Thereafter arguments were heard and since the appellant was found guilty, the trial court heard the appellant on the point of quantum of punishment. Thereafter the punishment as aforesaid was inflicted upon the appellant while other two accused persons were acquitted by the said Court.

3. Feeling aggrieved by the said judgment and conviction order of the Trial Court, the appellant has preferred this appeal before this Court. It has been mainly contended here that the Trial Court had convicted the appellant without any evidence on record. Moreover, the evidence did not support the victim. The Trial Court had erred in holding that the victim was below the age of 16 years. At the time of appreciating the evidence, the Trial Court had omitted to consider that as per the case of the victim she had voluntarily accompanied the appellant and that the punishment inflicted is too harsh, considering the age of the appellant. That on the whole, the judgment and conviction order are illegal and deserve to be set-aside. The appellant has, therefore, prayed to set-aside the judgment and conviction order recorded against him. The appeal was admitted and since the appellant was aged 19 years at the time of conviction, the learned Judge of this Court had directed that the appeal may be expedited. Therefore, it has been placed for final hearing.

4. I have heard Mr.Prajapati learned advocate appearing for the appellant and Mr.S.S. Patel learned A.P.P. appearing on behalf of the State.

5. Now so far the evidence is concerned it is required to be considered that the prosecution has examined the following persons :-

5.1. Maganbhai Ramjibhai P.W.1 - Exh.16 the father of the victim and informant. He happens to be father of the victim. He had found that on the date of the incident, his daughter was not there at night hours and inquiry was made about her. Thereafter he also filed F.I.R. before the concerned Police Station.

5.2. P.W.2 - Parvatiben Maganbhai Parmar at Exh.18 is the wife of the informant and the mother of the victim. She had also given evidence in accordance with the evidence of the informant.

5.3. Then Minakshiben Maganbhai - P.W.3 at Exh.19 is the main witness. She is the victim of the offence and she has clearly deposed that she was taken away by the appellant and there rape was committed on her. Her clothes were seized by the Investigating Officer. Semen was also noticed thereon. The F.S.L. report disclosed that vaginal swab collected from the person of the victim contained human semen.

6. Then there is also evidence of other witnesses

who were cross-examined at length, but nothing fruitful appears to have been brought out during the lengthy cross-examination. Dr.Chunilal Bhalabhai P.W.4 - Exh.21 is the Medical Officer who had examined the victim. The witness has stated that there was no mark of injury on the body of the victim when she was examined by him. Further, it seems that there may be some consent on her part, therefore, there may not be any injury on her body at the relevant point of time. However, the history recorded by him clearly shows that the appellant and the victim had run away together. Dr.Kanjibhai Dabhi P.W.5 Exh.24 is a Medical Officer who had examined the present appellant. He had also examined the victim for the purpose of assessment of her age. Ranchhodbhai C. Rohit P.W.6 - Exh.30 is a panch witness. Since the witness has turned hostile it may not be very much necessary to look into his evidence. Jethabhai H. Barot P.W.15 Exh.43 was working as a Principal in Simli Sarvajanik Vidyamandir. He has brought school register and school leaving certificate which shows that the date of birth of the petitioner was recorded as 25.11.1984. This is a primary piece of evidence and there is no reason to discard the said evidence on record. Purshottambhai Koyabhai Rohit P.W.16 - Exh.49 was working as a Talati-cum-mantri. He had brought and produced birth register for the year 1984. He has clearly deposed before the Trial Court that there is an entry at Sr.no.85 at page 9 showing the birth date of the victim as 25.11.1984. He produced the same on the record of the Trial Court. Considering the birth register entry and the date of birth recorded in the school leaving certificate in respect of the victim, it clearly appears that the date of birth of the victim is 25.11.1984 and the offence is said to have been committed in February, 2000. Dr.Bharatbhai N. Chauhan P.W.17 Exh.53 is also the Medical Officer who had examined the victim for the purpose of assessment of her age. Further the birth register and school leaving certificate both are produced on record. The opinion of Dr.Dabhi is very much useful for the purpose of assessing the age of the victim. Same is the case of Dr.Soni at Exh.63. Dhanjibhai Thakarsinh Vadaliya is the Police Officer who had investigated the case in question. Sameway, Bhaturbhai Nathani P.W.19 is also a Police Officer who was examined at Exh.84 by the appellant as his defence witness. He has produced First Information Report, (relating to other case) which was registered in September, 1999. It appears that the said F.I.R. had no connection with the present case.

6.1. Mahendrabhai Natwarsinh at Exh.89 is also a witness examined by the appellant as a defence witness.

His evidence is also not useful for the purpose of present offence. Sameway, Chaganbhai Parmar at Exh. 91 was also examined as defence witness. Rameshbhai B. Rohit at Exh.93 was also a defence witness. In fact the evidence of these witnesses is not relevant for the purpose of deciding the fact situation in the present case. The learned advocate for the appellant also did not rely upon it. The above evidence clearly reveals that the victim has deposed in so many terms that rape was committed on her by the appellant and the appellant had kidnapped her on the pretext that he would marry her. In fact they have stayed together for some days. But it is a matter on record that no marriage ceremony had taken place. Admittedly, the appellant had not married the victim. The oral evidence of the victim is clearly supported by the medical evidence and it is further supported by F.S.L. report showing presence of semen with blood in the vaginal swab collected from the person of the victim. In view of the aforesaid evidence and considering the fact that there is conclusive evidence with respect to the age of the victim. Even if, there was a consent on the part of the victim in having a physical relation with the appellant, the offence is made out. For this purpose we can refer to the provision made in clause sixthly of Section 375 of I.P.C. wherein it has been mentioned that even if there is a consent on the part of the girl below 16 years of age then the offence of rape can be said to have been committed. In other words, the question of consent becomes redundant when the girl is found to be below 16 years of age. On one hand it is conclusively established that the girl was below the age of 16 years at the time when the offence was committed. Therefore, here the question of consent will lose its importance. The victim has clearly deposed before the Trial Court that rape was committed on her. Then her oral testimony is further submitted by medical evidence. Even the history given by the victim to the Doctor supports the case of the prosecution to a great extent. The F.S.L. report further supports the case of the prosecution. Had there not been an act of rape committed by the appellant on the victim, the presence of the semen in the vagina of the victim could not have been traced. So there is conclusive evidence on record to prove that the appellant had committed rape on the victim.

7. Considering the age of the victim even the offence punishable under Section 363 & 366 I.P.C. are clearly made out. Even if we take it that the victim had voluntarily gone with the appellant, then also considering the evidence with respect to her age, the

offences punishable under Section 363 and 366 are clearly proved. In that view of the matter, the Trial Court has not committed any error in convicting the appellant for the aforesaid offence. The learned advocate for the appellant has heavily relied upon the consent of the victim as said above. The question of consent of the victim is totally irrelevant when the age of the victim is proved to be below 16 years. The learned advocate for the appellant has also argued that according to the medical evidence the girl can be below 16 years of age and even she can be of 18 years of age. After all the medical opinion is the opinion which cannot bypass the evidence of the panchayat record and school leaving certificate on record. If the medical opinion says that the a particular person is aged about 16 years but the panchayat record clearly proves that the victim was below 16 years at the time when the offence is said to have been committed, the evidence of panchayat record will really bypass the medical opinion. Anyway, there is sufficient evidence on record to show that the victim was below the age of 16 years at the relevant point of time, therefore, her consent in the commission of the offence of rape is totally immaterial. At this stage, in view of the above decision it has been accepted that the trial court has not committed any error in convicting the appellant for the aforesaid offences and, therefore, the judgment and conviction order cannot be treated to be illegal and erroneous. At this stage the learned advocate for the appellant has contended that looking to the fact that the appellant was below 19 years of age at the time of the commission of the alleged offence, lenient view may be extended and even the benefit of Probation may be extended to the appellant, in view of the provisions made under Sections 360 & 361 of the Code of Criminal Procedure, 1973 and in view of the provisions made in Sections 4, 5 & 6 of the Probation of Offenders Act, 1958.

8. When the offence of rape punishable under Section 376 has been established against the appellant and when the said offence is punishable with imprisonment for life then in that case question of extension of benefit of Section 360, 361 of the Cr.P.C., 1973, as well as provisions made under Sections 4, 5 & 6 of the Probation of Offenders Act, 1958 will not arise. Considering the age of the appellant and age of the victim and looking to the fact that the victim had given history to the medical officer that she had run away with the appellant and considering the fact that she had taken away some money, her clothes and ornaments from the house of her parents. It appears that she had voluntarily gone with the

appellant. She had also stayed with the appellant for some days and never made any complaint to anybody. This will not be a point for not accepting her evidence for the purpose of holding the appellant guilty for the offence punishable under Section 363, 366 and 376 I.P.C. But these are the factors which would be useful for the purpose of determination of quantum of punishment. Having regards to the aforesaid facts and circumstances and considering the aforesaid special and adequate reasons, I am of the view, that the sentence inflicted upon the appellant can be reduced to some extent.

For the foregoing reasons, the appeal is partly allowed. The judgment and conviction order recorded by the Trial Court convicting the appellant for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code are confirmed. However, the appellant is sentenced to suffer R.I. for five years instead of seven years for the offence punishable under Section 376 of the Indian Penal Code. Rest of the punishment inflicted on the appellant by the Trial Court for the offences punishable under Sections 363 and 366 are confirmed. Even the order of imposition of fine and the order of imprisonment in default of payment of fine in respect of offences punishable under Sections 363, 366 and 376 of Indian Penal Code are also confirmed.

[D.P. BUCH, J.]

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